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No. 89-366

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

WOMEN INVOLVED IN FARM ECONOMICS,
Petitioner,

v.

CLAYTON YEUTTER, SECRETARY OF AGRICULTURE,
and UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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The government's opposition to petitioner's application for review is designed primarily to persuade the Court that the effects of the D.C. Circuit's ruling are limited to what it calls the "peculiar posture" of this case, Opp. at 9, and to divert attention from a remarkable departure from principles that have long guided judicial review of agency action. This effort to camouflage important and recurring issues of administrative law must fail. The lower court's ruling adopts an unprecedented and highly deferential standard of review for certain categories of agency action that, if left standing, would not only confuse lower courts and litigants in future cases, but also would encourage federal agencies to thwart effective judicial review.

We initially demonstrate that, as conceded by the lower court, the questions presented have "implications that go far beyond this case." Pet. App. at 8a. We then show that the government has failed to harmonize the lower court's ruling with precedents of this Court and courts in other circuits. Indeed, the conflict created by the D.C. Circuit panel is plain enough to justify summary reversal.

1. The key issue presented is whether arbitrary-and-capricious judicial review under Section 706(2)(A) of the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988), can proceed without an examination of the agency's *actual* decision-making process in cases where the agency's action was exempt from the procedural requirements of the APA's Section 553.[1] The government seeks to minimize the importance of this issue with repeated references to the 1970 vintage of the agency regulation under review and the "unusual context" of this case. Opp. at 4, 6, 7, 9, 12. This rhetoric cannot obscure the obvious facts that countless categories of significant agency action are exempt from Section 553 or equivalent procedural requirements and that the lower court's new rule of administrative law would erode meaningful judicial review of all such action. Moreover, even beyond the decision's impact in other administrative law contexts, the ruling below, if left standing, would have a severe and discriminatory financial impact on independent women farmers throughout the country.

When Judge Silberman noted below that the panel opinion would have "implications that go far beyond this case," Pet. App. at 8a, he presumably was aware

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[1] The government entirely ignores petitioner's third question presented, which essentially asks whether the Secretary of Agriculture's use of a rule automatically treating married farm couples as "one person" is inherently irrational and conflicts with this Court's ruling in *United States* v. *Dege*, 364 U.S. 51 (1960), a decision the court below, like the government here, did not even attempt to distinguish.

that numerous types of agency action are not subject to Section 553 procedural requirements and that, in the future, such action would be entitled to his extremely deferential standard of arbitrary-and-capricious review. By its own terms, Section 553 exempts rulemakings that involve "military or foreign affairs" or that relate to "public property, loans, grants, benefits, or contracts." 5 U.S.C. § 553(a). Moreover, regardless of subject matter, Section 553 does not apply "to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice." *Id.*, § 553(b). Professor Davis, complaining that "[t]he exemptions from the required procedure of § 553 are too extensive," has observed that "more rulemaking is done without notice and comment procedure than with it." 1 K. Davis, *Administrative Law Treatise* § 6:30, at 593 (2d ed. 1978).[2] Under the decision below, such rulemaking will be subject to a relaxed standard of judicial review under Section 706(2)(A). Aside from these rulemaking procedures, many other types of agency action are exempt from Section 553 or equivalent procedural requirements, including informal adjudications and agency refusals to act. A rule liberating all of these categories of agency action from meaningful judicial review would have a baleful impact on administrative law and practice as we know it.

Furthermore, the facts of this case alone are sufficiently compelling to warrant this Court's review. In defending the Secretary of Agriculture's one-person rule below, the government insisted that invalidation of that rule would expose it to additional crop-subsidy payments to farm wives of at least $182 million annually. *See* Pet. App. at

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[2] There are, of course, countless administrative rules on the books that predate the APA and, thus, would never have been subject to Section 553 procedural requirements. Many such old rules continue to have significant impact and are the subject of legal challenges today. *E.g., Lever Bros. Co.* v. *United States*, 877 F.2d 101, 105 (D.C. Cir. 1989).

44a-45a; *see also* Brief for Appellants, at 9, 11, 32 (D.C. Cir.). According to the government's litigation affidavit, these obligations could implicate 6,500 farmers throughout the country. If the D.C. Circuit's reversal of the district court's ruling is upheld, the Secretary will be able to pursue repayment of any funds the government paid during the 1988 crop year as a result of the district court's injunction. *See* Pet. App. at 7a n.3. In light of this, it is nothing less than callous for the government to suggest that this case has "no prospective significance." Opp. at 11.

2. The government has skirted entirely the straightforward issue of statutory construction and application posed by this case. Section 706(2)(A) of the APA proscribes "agency action . . . found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." This Court has held repeatedly that Section 706(2)(A) judicial review must focus on the reasonableness of the agency's actual decisionmaking process and the extent to which it reflected consideration of all relevant factors. The decision below jettisons this longstanding principle by accepting any explanation for the agency's action that can be conceived by its lawyers after the fact.

Nothing in the text of Section 706(2)(A) or this Court's relevant precedents relaxes the intensity of judicial review where an agency's action was exempt from the procedural requirements of Section 553. While the existence of such procedural requirements is clearly relevant to a challenge under 706(2)(D)—which proscribes agency action taken "without observance of procedure required by law"—the scope and content of arbitrary-and-capricious review under Section 706(2)(A) have never before turned on the existence of Section 553 procedural requirements.[3]

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[3] The Fifth Circuit's opinion in *United States* v. *Garner*, 767 F.2d 104 (5th Cir. 1985), carefully analyzed the precise question

To the contrary, this Court in *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416-21 (1971), expressly subjected agency action exempt from Section 553 procedural requirements to the full force of Section 706(2)(A)'s "searching and careful" judicial inquiry into the reasonableness of the agency's actual decisionmaking process. The government attempts to distinguish *Overton Park* on the ground that there was an administrative record in that case. Opp. at 8. But even a cursory examination of that opinion reveals that this Court's ruling on the scope of Section 706(2)(A) review did not rest on the fortuitous presence of an administrative record. The Court merely noted that the presence of such a record, if properly evaluated, might permit judicial review to proceed without a remand to the agency. 401 U.S. at 419. Significantly, even though there was an administrative record, the Court held that the petitioner would be able to supplement it with testimony from agency officials, *id.* at 420, a procedure foreclosed by the decision below.[4]

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presented here and squarely conflicts with the decision below. The government's attempt to reconcile the two decisions is simply untenable. *See* page 8, below.

[4] The government asserts that an administrative record was not created here and that testimony by agency officials would "in all likelihood . . . 'add little'" to the explanations of agency counsel. Opp. at 8, 10. As far as we can tell, the government has never attempted either to ascertain whether a record exists or to identify the participants in the 1970 rulemaking. Instead, agency counsel has done nothing but hypothesize about why the agency may have done what it did in 1970. Counsel has done so by relying on the resemblance of the one-person rule to a floor amendment *defeated* in 1970 and on an estimate of the *1988* cost of abandoning the rule. Curiously enough, the government seeks to discourage this Court from undertaking a "highly factbound inquiry," Opp. at 10, yet the government has no qualms about the D.C. Circuit having reversed the district court on the basis of speculation about facts—a role inappropriate for *any* reviewing court. Petitioner is not asking this Court to conduct a "factbound inquiry," but merely to apply the correct rules of law and to remand to the district court for a reconstruction of what actually did happen within the administrative agency.

The rule adopted by the D.C. Circuit would create a perverse incentive for agencies to avoid creation of administrative records as a means of shielding their actions from meaningful judicial review. By avoiding creation of a record, agencies would enjoy free rein to act for hidden or even forbidden reasons, confident that they could later justify their actions with *post hoc* excuses and rationalizations. Section 706(2)(A) requires in all cases that an agency establish that its actual decisionmaking process was not arbitrary and capricious. A writ should issue to resolve the plain conflict created by the D.C. Circuit's departure from this Court's prior rulings construing Section 706(2)(A).

3. The government also stoutly defends the virtues of judicial review of government counsel's representations rather than the reasoning of the agency. Opp. at 7-10. The government fails to marshal even a single decision of this Court or any other that supports its argument or the rationale developed by the D.C. Circuit. This is hardly surprising, as acceptance of counsel's rationalizations flies in the face of the black-letter rule that "[t]he courts may not accept appellate counsel's *post hoc* rationalizations for agency action . . . ." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962).

The government suggests an exception. It argues that the proscription applies only where the agency publicly compiled an administrative record and has no application in a case such as this where the agency acted in expedient secrecy. Opp. at 8 n.3. But this Court's *per curiam* decision in *Camp* v. *Pitts*, 411 U.S. 138 (1973), entirely disposes of that argument. While the government correctly notes that the agency had compiled a modest administrative record in that case, it was so thin that the Court issued clear instructions to reviewing courts concerning their duties where, as here, there has been "such failure to explain administrative action as to frustrate effective judicial review." 411 U.S. at 142-43. *Camp* teaches that,

under those circumstances, the appropriate course is "to obtain from the agency, either through affidavits or testimony, such additional explanation of the reasons for the agency decision as may prove necessary." *Id.* at 143. The D.C. Circuit itself has adopted similar instructions. *AT&T Information Sys., Inc.* v. *GSA*, 810 F.2d 1233, 1236 (D.C. Cir. 1987) ("'new material should be merely explanatory of the original record and should contain no new rationalizations'") (citation omitted). The D.C. Circuit panel's failure to follow those instructions in this case requires reversal.

The government, like the court below, speculates that counsel's arguments in this instance are as likely to reflect the Secretary's thinking in 1970 as any other source of information. Indeed, the government offers the remarkable assertion that counsel's rationalizations are "the best possible reconstruction of what occurred in 1970." Opp. at 10. This is obviously wrong. Government counsel's explanations of the Secretary's 1970 actions are based on either pure speculation or events after 1970. That suspect reconstruction obviously carries no more indicia of reliability than our own, which is precisely why courts review agency action, not lawyers' inventiveness.

The Court's decision in *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), certainly does not support the lower court's reliance on counsel's speculation. The government blithely asserts that *Chenery*'s proscription against judicial assumption of the agency function dissipates when the agency acted in the past and its rule is no longer in effect. Opp. at 9. In other words, according to the government, when an agency's action has been superseded, a reviewing court is free to "intrude upon the domain which Congress has exclusively entrusted to an administrative agency." 318 U.S. at 88. Under that theory, an agency's revision of its rules or regulations would nullify the right to meaningful judicial review of all who were adversely affected by the prior rule.

Chenery, of course, admits no such exception. Indeed, such intrusions are precisely what *Chenery* forbids. Petitioner's members, independent working farmers, were adversely affected by the Secretary's prior rule and were deprived of payments that were made to all other classifications of independent farmers. They are entitled to meaningful judicial review of that action, not review of the arguments made by lawyers from the Department of Justice.

Nor is it true, as the government asserts, that the conflict between the decision below and the Fifth Circuit's decision in *United States* v. *Garner*, 767 F.2d 104 (5th Cir. 1985), is more apparent than real. Although the *Garner* court noted that the agency regulation under review was promulgated pursuant to Section 553 notice-and-comment rulemaking, that rule was—like the one-person rule—issued without the concise general statement required by Section 553(c) or "any explanation at all for the Secretary's promulgation." 767 F.2d at 110, 118. Unlike the panel below, however, the Fifth Circuit's well-reasoned decision thoroughly analyzed and flatly rejected the government's claims that arbitrary-and-capricious review should be diluted and counsel's *post hoc* explanation for the regulation credited. *Id.* at 118 & n.22, 121-23. The decision below cannot be reconciled with the Fifth Circuit's holding or with the decisions of this Court upon which it was based.

CONCLUSION

For the foregoing reasons and those set forth in its petition, petitioner respectfully submits that a writ should issue to review all three questions presented.

Respectfully submitted,

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